

1 10-year maximum and no mandatory minimum sentence, in exchange for dismissal of the
 2 remaining counts. (Resp't Opp'n, App. at 2.) The plea agreement recommended the
 3 following Base Offense Level and Adjustments under the Guidelines: "1) Base Offense
 4 Level . . . 28; 2) Upward Departure for Quantity [cf. § 2D1.1 comment (n.16) . . . +2; 3)
 5 Hazardous Waste [§ 2D1.1(b)(3)] . . . +2; 4) Acceptance of Responsibility [§ 3E.1.1(a)] . .
 6 . -2." (*Id.* at 7.) The plea agreement also contained a waiver of "any right to appeal or to
 7 collaterally attack the conviction and sentence . . . unless the court imposes a custodial
 8 sentence greater than the high end of the guideline range . . . recommended by the
 9 Government pursuant to this plea agreement at the time of sentencing." (*Id.* at 9.)

10 Sometime around June 2004, Petitioner and her husband absconded from
 11 supervision. [*See* Doc. No. 79.] A bench warrant was issued, and Petitioner was arrested on
 12 July 29, 2005. [Doc. No. 92.] Petitioner filed a motion for new counsel, which the Court
 13 granted. [Doc. No. 95.] Petitioner thereafter filed a motion to dismiss the indictment for
 14 lack of jurisdiction and to withdraw her guilty plea, which the Court denied. [Doc. Nos.
 15 127, 153, 171.] On January 27, 2006, the Court sentenced Petitioner to 120 months in
 16 custody followed by supervised release for three years. [Doc. No. 171.]

17 Petitioner appealed. [Doc. No. 173.] The Ninth Circuit affirmed Petitioner's
 18 conviction and sentence in an unpublished memorandum decision filed February 22, 2007.
 19 [Doc. No. 188; 2007 WL 580679 (9th Cir. Feb. 22, 2007). On June 25, 2007, the Supreme
 20 Court denied certiorari. 551 U.S. 1153 (2007).

21 ***Legal Standard***

22 A sentencing court is authorized to "vacate, set aside or correct the sentence" of a
 23 federal prisoner if it concludes that "the sentence was imposed in violation of the
 24 Constitution or laws of the United States." 28 U.S.C. § 2255(a). Claims for relief under §
 25 2255 must be based on constitutional error, jurisdictional defect, or an error resulting in a
 26 "complete miscarriage of justice" or "inconsistent with the rudimentary demands of fair
 27 procedure." *United States v. Timmreck*, 441 U.S. 780, 783 (1979). Additionally, the scope
 28 of collateral attack is much more limited than on direct appeal. *United States v. Addonizio*,

1 442 U.S. 178, 184-85 (1979). Further, if a petitioner has procedurally defaulted by not
 2 raising a claim on direct review, he will be barred from raising it on collateral review
 3 unless he can meet one of the exceptions excusing procedural default, such as cause and
 4 prejudice or a fundamental miscarriage of justice. *See Bousley v. United States*, 523 U.S.
 5 614, 623-24 (1998); *United States v. Frady*, 456 U.S. 152, 167-68 (1982).

6 If the record clearly indicates that a petitioner does not have a claim or that a
 7 petitioner has asserted “no more than allegations unsupported by the facts or refuted by the
 8 record,” a district court can deny a § 2255 motion without holding an evidentiary hearing.
 9 *See United States v. Quan*, 789 F.2d 711 (715 (9th Cir. 1986).

10 ***Discussion***

11 Petitioner seeks to have her sentence corrected on the grounds that she had
 12 ineffective assistance of counsel, the supervised release portion of her sentence is illegal,
 13 and the sentence enhancements applied by the Court are illegal.

14 **I. Ineffective Assistance of Counsel**

15 Petitioner offers three grounds in support of her ineffective assistance of counsel
 16 claim: 1) Trial and appellate counsel failed to object to the two-level upward adjustment
 17 related to disposal of waste; 2) Trial and appellate counsel failed to object to the two-level
 18 adjustment based on the quantity of iodine; 3) Trial and appellate counsel failed to object
 19 the Court’s imposition of supervised release. (Pet’r Mem. of P. & A. 3.)

20 **A. Standard for Ineffective Assistance of Counsel Claims**

21 “It has long been recognized that the right to counsel is the right to the effective
 22 assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). To
 23 succeed on an ineffective assistance of counsel claim, Petitioner must make two showings.
 24 First, he must demonstrate that “counsel’s performance was deficient. This requires
 25 showing that counsel made errors so serious that counsel was not functioning as the
 26 ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland v. Washington*,
 27 466 U.S. 668, 687 (1984). Then, Petitioner must show that his counsel’s deficient
 28 performance “prejudiced the defense. This requires showing that counsel’s errors were so

1 serious as to deprive the defendant of a fair trial.” *Id.* A court may deny a claim if it
 2 determines either counsel’s performance was not deficient or that counsel’s performance
 3 did not prejudice the defense. *Id.* at 700. Moreover, “[r]eview of counsel’s performance is
 4 highly deferential and there is a strong presumption that counsel’s conduct fell within the
 5 wide range of reasonable representation.” *United States v. Ferreira-Alameda*, 815 F.2d
 6 1251, 1253 (9th Cir. 1986) (citations omitted). Further, the Court is cognizant that “[i]t is
 7 all too tempting for a defendant to second-guess counsel’s assistance after conviction or
 8 adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has
 9 proved unsuccessful, to conclude that a particular act or omission of counsel was
 10 unreasonable.” *Strickland*, 466 U.S. at 689.

11 B. Sentence Adjustments

12 Petitioner alleges that her counsel was ineffective for failing to challenge the Court’s
 13 imposition of sentence enhancements for disposal of waste and quantity of iodine. (Pet’r
 14 Mem. of P. & A. 3-4.) Petitioner is unable to satisfy either prong of the *Strickland* standard
 15 with respect to this claim.

16 Petitioner has provided no evidence that her counsel’s performance was deficient.
 17 Petitioner agreed to the sentence enhancements as part of her plea agreement. (Resp’t
 18 Opp’n, App. at 7.) At sentencing, Petitioner’s counsel implicitly argued against the
 19 enhancements by moving to withdraw the plea agreement, suggesting alternative guidelines
 20 calculations, and arguing that the Government was required to prove the total quantity of
 21 iodine sold. (*Id.* at 38-41, 57, 65-68.) Given this evidence, Petitioner cannot overcome the
 22 “strong presumption that counsel’s conduct fell within the wide range of reasonable
 23 representation.” *Ferreira-Alameda*, 815 F.2d at 1253.

24 Further, Petitioner has not demonstrated prejudice. Again, Petitioner agreed to the
 25 sentence enhancements, as well as the factual basis underlying them, in her plea agreement.
 26 (Resp’t Opp’n, App. at 7.) Because of this, there is no reason to believe that, had
 27 Petitioner’s counsel explicitly objected to the imposition of the enhancements, the Court
 28 would have sentenced Petitioner any differently.

1 C. Supervised Release

2 Petitioner alleges that both her trial and appellate counsel were ineffective for failing
3 to challenge the Court's imposition of a term of supervised release in its sentence. (Pet'r
4 Mem. of P. & A. 3-4.) Petitioner alleges that counsel should have objected because the
5 imposition of supervised release was "clearly illegal, since the Court had already sentenced
6 defendant to the statutory maximum incarceration term of 120 months." (*Id.*) Petitioner's
7 argument is unavailing, as the Ninth Circuit has clearly rejected this argument. *See, e.g.,*
8 *United States v. Liero*, 298 F.3d 1175, 1177-78 (9th Cir. 2002) (holding that supervised
9 release is not part of the term of imprisonment, so its imposition does not violate statutory
10 maximum). Because this argument lacks merit, Petitioner is unable to prove that the result
11 of the proceeding would have been different had counsel raised the argument.

12 Petitioner has not met the *Strickland* standard for ineffective assistance of counsel
13 claims. Accordingly, the Court **DENIES** her ineffective assistance of counsel claim.

14 **II. Sentence Enhancements**

15 Petitioner alleges that the sentence enhancements imposed by the Court for disposal
16 of waste and iodine quantity were illegal because they were "not authorized by the
17 judgment of conviction" and "in violation of the Constitution." (Pet'r Mem. of P. & A. 6.)
18 Petitioner claims that she never agreed to these enhancements; however, this assertion is
19 clearly contradicted by the record. The plea agreement explicitly provided that the "parties
20 will jointly recommend" the base offense level and adjustments, which included the
21 enhancements at issue. (*See* Resp't Opp'n, App. at 7.) Petitioner also admitted to the
22 factual basis supporting the enhancements in the plea agreement. (*Id.* at 3-4.)

23 Petitioner also suggests that the enhancements violated the rule announced in
24 *Apprendi v. New Jersey*, 530 U.S. 46, 490 (2000): "Other than the fact of a prior
25 conviction, any fact that increases the penalty for a crime beyond the prescribed statutory
26 maximum must be submitted to a jury, and proved beyond a reasonable doubt." (Pet'r
27 Mem. of P. & A. 7.) In *Blakely v. Washington*, the Supreme Court announced, "[T]he
28 statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose

solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”
 542 U.S. 296, 303 (2004). In the present case, Petitioner admitted the facts that served as
 the basis for the sentence enhancements. (*See* Resp’t Opp’n, App. at 3-4 (“The amount of
 iodine involved in the offense . . . was at least 295 pounds. . . . The offense involved the
 unlawful disposal of hazardous waste. . . .”).) Because of Petitioner’s factual admissions in
 the plea agreement, the imposition of the enhancements did not violate *Apprendi* or
Blakely. Therefore, the Court **DENIES** Petitioner’s illegal sentence claim.

III. Supervised Release

Petitioner claims that the Court’s imposition of supervised release in addition to the
 maximum custodial sentence resulted in a sentence in excess of the statutory maximum.
 (Pet’r Mem. of P. & A. 11.) As discussed above, this argument is unavailing, as it has been
 expressly rejected by the Ninth Circuit. *See Liero*, 298 F.3d at 1177-78. Accordingly, the
 Court **DENIES** this claim.

IV. Evidentiary Hearing

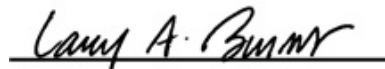
In the present case, no evidentiary hearing is merited because Petitioner’s petition
 rests on legal arguments that do not require resolution of any factual disputes. In order for
 Petitioner to qualify for an evidentiary hearing, she must “make specific factual allegations
 which, if true, would entitle him to relief.” *Bauman v. United States*, 692 F.2d 565, 571
 (9th Cir. 1982). Petitioner has not made any new factual allegations or provided new
 factual evidence to contest her conviction. Therefore, Petitioner is not entitled to an
 evidentiary hearing.

Conclusion

For the foregoing reasons, this Court **DENIES** the Petition for Writ of Habeas
 Corpus and dismisses the action with prejudice.

IT IS SO ORDERED.

DATED: July 10, 2010



HONORABLE LARRY ALAN BURNS
 United States District Judge